

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

|  |   |                            |
|--|---|----------------------------|
| UNITED STATES                                  | ) |                            |
|  | ) |                            |
| v.   | ) | <b>DEFENSE MOTION FOR</b>  |
|  | ) | <b>JUDICIAL NOTICE OF</b>  |
| <b>MANNING</b> , Bradley E., PFC               | ) | <b>DOS, ONCIX AND IRTF</b> |
| U.S. Army, (b) (6)                             | ) | <b>DAMAGE ASSESSMENTS</b>  |
| Headquarters and Headquarters Company, U.S.    | ) |                            |
| Army Garrison, Joint Base Myer-Henderson Hall, | ) | DATED: 16 November 2012    |
| Fort Myer, VA 22211                            | ) |                            |

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to Military Rules of Evidence (MRE) 201, 801(d)(2), and 803(6) and 803(8) to take judicial notice of damage assessments produced by Department of State (DOS), Office of National Counterintelligence Executive (ONCIX), and Information Review Task Force (IRTF).

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred to a general court-martial on 3 February 2012.

5. The DOS, ONCIX, and IRTF each produced a document assessing the effect of the leaks with which PFC Manning is charged.

6. On 23 March 2012 this Court ruled that the damage assessments created by DOS and IRTF contained information relevant to any pre-sentencing phase of this trial. Likewise, this Court ruled that DOS, ONCIX, and IRTF are closely-aligned with the Government for purposes of discovery. *See* Appellate Exhibit 36.

7. On 23 August 2012 this Court ruled that the ONCIX damage assessment contained material that would be relevant during any pre-sentencing phase of PFC Manning's trial. *See* Appellate Exhibit 255

#### WITNESSES/EVIDENCE

8. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the proffered damage assessments. If necessary, the Defense requests the Government provide the Court with a copy of the proffered damage assessments.

#### LEGAL AUTHORITY AND ARGUMENT

9. In the interest of judicial economy, MRE 201 relieves a proponent from formally proving certain facts that reasonable persons would not dispute. There are two categories of adjudicative facts that may be noticed under the rule. First, the military judge may take judicial notice of adjudicative facts that are "generally known universally, locally, or in the area pertinent to the event." MRE 201(b)(1). Under this category of adjudicative facts, it is not the military judge's knowledge or experience that is controlling. Instead, the test is whether the fact is generally known by those that would have a reason to know the adjudicative fact. *U.S. v. Brown*, 33 M.J. 706, 709 (N.M.C.A 1992). The second category of adjudicative facts is those "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b)(2). This category of adjudicative facts includes government records, business records, information in almanacs, scientific facts, and well documented reports. *Id.* See also, *U.S. v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987). Moreover, judicial notice may be taken of a periodical. *U.S. v. Needham*, 23 M.J. 383, 385 (C.M.A. 1983)(taking judicial notice of Drug Enforcement Agency publication). The key requirement for judicial notice under this category is that the source relied upon must be reliable.

10. Under MRE 201(d), a military judge must take judicial notice if the proponent presents the necessary supporting information. In making the determination whether a fact is capable of being judicially noticed, the military judge is not bound by the rules of evidence. 1 STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 201.02[3] (2003) Additionally, the information relied upon by the party requesting judicial notice need not be otherwise admissible. *Id.* The determination of whether a fact is capable of being judicially noticed is a preliminary question for the military judge. *See* MRE 104(a).

11. This Court has already determined that the proffered damage assessments are relevant. *See* Appellate Exhibits 36 and 255. Thus, the remaining inquiry is whether the statements qualify as non-hearsay or, if not, does a hearsay exception exist for their admission. The damage

assessments are admissible as non-hearsay under MRE 803(d)(2)(D), or, in the alternative, as an exception to the hearsay rule under RCM 803(6).

12. The damage assessments are admissible as a statement by a party opponent under MRE 801(d)(2)(D). MRE 802(d)(2)(D) establishes that statements by a party's agent or servant are admissible against that party as long as those statements fall within the agent's or servant's scope of authority and are made while the agency or employment relationship continued. This Court has ruled that "it is possible for statements by executive branch officials to be admitted in a criminal proceeding as admission of a party opponent." *See* Appellate Exhibit 356 at 7, citing *U.S. v. VanGriffin*, 874 F.2d 634, 638 (9th Cir. 1989), *U.S. v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002), and *U.S. v. Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994). This Court further ruled, "[t]o qualify for admission as statement against a party opponent, the statement must bear such a close resemblance to in-court testimony that they may be considered its functional equivalent." *Id.* at 8.

13. Here, the damage assessments are statements made by individuals that clearly qualify as a party opponent. Indeed, this court ruled that DOS, ONCIX, and IRTF are each closely related to the prosecution in this case. *See* Appellate Exhibit 36. Further, each organization was directly affected by the leaks for which PFC Manning has been charged. Because each organization is closely related to the prosecution in this case each is a party opponent.

14. Each of the damage assessments contains statements that bear such a close resemblance to in-court testimony that they are functionally the same. Each damage assessment contains assertions of fact that contradict the Government's likely trial narrative that the disclosure of the charged documents caused damage to the United States. The primary purpose of these documents was to convey unambiguous, factual information to the highest levels of our government. Presumably, the factual information included was confirmed prior to the assessments being finalized and distributed. In all likelihood, any witness called would testify in a manner consistent with the assessments. As such, the damage assessments are reliable such that they are the functional equivalent of in-court testimony. Because the damage assessments were created by a party opponent and are the functional equivalent of in-court testimony they are admissible under MRE 801(d)(2)(D).

15. The damage assessments are also admissible as an exception to the hearsay rule under MRE 803(6). MRE 803(6) reads:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Mil. R. Evid. 902(11) or any other statute permitting certification in a criminal proceeding in a court of the United States.

Damage assessments are documents kept in the regular practice of business activity. AR 380-5, para. 10-5(a) establishes:

When notified of possible or actual compromise, the holder of the information or material will ensure that the original classification authority, responsible for each item of the information, is notified of the incident. The OCA will verify and reevaluate the classification of the information and will conduct a damage assessment.

16. The damage assessments at issue fall squarely within this rule. Each assessment was created pursuant to a regulatory mandate and is kept in the ordinary course of business. Likewise, though called a “damage assessment,” the assessments clearly fall within the meaning of “memorandum, report, record, or data compilation in any form.” Further, the assessments were created by individuals with knowledge shortly after the leaks for which PFC Manning has been charged. Because the damage assessments were created as part of regularly-conducted business they are admissible pursuant to MRE 803(6).

17. Likewise, the damage assessments are admissible under MRE 803(8), which provides a hearsay exception for:

Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there as a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness

18. The damage assessments fall squarely within the meaning of MRE 803(8). *Byrd v. ABC Professional Tree Service, Inc.*, 832 F.Supp.2d 917 (M.D.Tenn 2011)(holding Department of Labor press release fell within hearsay 803(8) exception), *see also, Zeigler v. Fisher Price, Inc.*, 302 F.Supp.2d 999, 1021, n10 (N.D.Iowa 2004) (“To the extent the press release can be construed as stating conclusions or opinions of the [Consumer Products Safety Commission], it also was admissible”). DOS, ONCIX, and IRTF are each a public office or agency and the damage assessments are clearly a record, report, statement or data compilation. Further, the damage assessments set forth the activities of the respective office or agency because it is common for an office or agency to create a damage assessment in instances of unauthorized disclosure. Likewise, the damage assessments outline the respective agencies factual findings and response to the leaks which gave rise to this trial. As such, the damage assessments are reports of public office that set forth the activities of the agency or office and are, thus, admissible under MRE 803(8).

CONCLUSION

19. Based on the above, the Defense requests that the Court to take judicial notice of the requested adjudicate facts and law.

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', with a long horizontal flourish extending to the right.

JOSHUA J. TOOMAN  
CPT, JA  
Defense Counsel